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IN THE

Supreme Court of the United States

October Term 1962

No. 858

YACIMIENTOS PETROLIFEROS FISCALES,
Petitioner,

against

PARAGON OIL CO., INC.,

and

REPUBLIC TANKERS, S. A.,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

DAVID I. GILCHRIST,
Proctor for Respondent,
Republic Tankers, S. A.,
26 Broadway,
New York 4, New York.

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A full and lucid statement of the facts in the case is contained in the opinion of the Court of Appeals for the Second Circuit, reported at 310 F. 2d 169, pp. 2a through 11a of petitioner's appendix to its brief. The detailed and meticulous findings of fact and conclusions of law of the trial court and its well considered opinion appear at pages A-12 through A-30 of the appendix below (Vol. I).

The gist of the decision is contained in the trial court's third conclusion of law, at A-29 of the appendix below:

> "The failure of respondent YPF to provide libellant's vessel with a safe berth was a breach of the

safe berth clause contained in the Affreightment Contract between respondent Republic and YPF and consequently a breach of the safe berth clause contained in the charter party between libellant and respondent Republic."

The decision followed well settled precedents which have consistently held a safe berth clause couched in the language present here as an "express warranty" that the berth designated by the petitioner here will be one "the vessel can proceed thereto, lie at, and depart therefrom always safely afloat * * *" *Cities Service Transp. Co.* v. *Gulf Refining Co.*, 2 Cir., 1933, 79 F. 2d 521, aff'g 9 F. Supp. 963; *Park S.S. Co.* v. *Cities Service Oil Co.*, 2 Cir., 1951, 188 F. 2d 804, cert. denied 342 U. S. 862 (p. A-26 of the appendix below, Vol. I).

Upon a careful review extending to all the petitioner's contentions on the facts, the trial court's findings and conclusions were affirmed by the Court of Appeals. Petitioner has already received a fuller review than the rule of *McAllister* v. *United States*, 348 U. S. 19, 20, would seem to warrant. No further review can be justified under that rule nor is any indicated by the contentions advanced by petitioner in the present petition for a writ of certiorari.

The Petition Does Not Satisfy the Requirements of Rule 19

The petition presents no special or important reasons for the granting of a writ of certiorari; it does not raise any issue which satisfies the criteria for review by certiorari established by Rule 19 of this Court.

The decision of the Court of Appeals for the Second Circuit is not in conflict with the decision of any other court of appeals. No important state or territorial ques-

tion has been decided in a way in conflict with applicable state or territorial law. There has been no decision on an important question of federal law which has not been, but should be settled by this court; nor is the decision below in conflict with applicable decisions of this court. The courts below have not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the court's power of supervision.

No Jurisdictional or Constitutional Question is Presented

Petitioner's assertions in this regard may be reduced to the twofold propositions that Republic's impleader of YPF falls outside the admiralty jurisdiction of the federal courts and that the retention of the matter on the admiralty side of the court has deprived petitioner of the right to a jury trial provided for in the Seventh Amendment.

A key premise to this argument is petitioner's assertion "that contracts to be enforceable in admiralty must be wholly maritime, and that contracts involving purchase and sale as well as transportation are not maritime contracts enforceable in admiralty" (p. 12 of petitioner's brief).

If, in fact, Republic's cause of action over against YPF is wholly (or essentially) maritime, if it lies within the admiralty jurisdiction, petitioner's "questions presented" on this score are non-existent. Respondent Republic believes it is readily demonstrable that such is the case.

Respondent Republic's impleading petition appears at pages A-71 through A-75 of the appendix below (Vol. I). In essence, as held by both courts below, it pleaded that if Republic was liable to Paragon for breach of the safe

berth warranty contained in its charter party with Paragon, YPF was likewise liable to it for breach of the safe berth warranty contained in the contract between YPF and Republic. That contract was stipulated in evidence and appears as Republic's appendix below (Vol. II).

It was the trial court's finding of fact as well as its conclusion of law that this contract was one of affreightment.

Finding No. 7 of the trial court was:

> "In December 1956, YPF entered into an agreement (Affreightment Contract) with respondent Republic for affreightment and transportation of the said seven cargoes of fuel oil to be delivered at YPF's option to either Buenos Aires or LaPlata, Argentina. (Purchase Order No. NY 1971, Rep. Ex. A.)"

The following finding (No. 8) notes the fact that this contract, as well as the contract with Paragon Oil Company, Inc. of Delaware (not a party to this action) for the purchase of the fuel oil, are upon printed Y.P.F. forms, designated as "Purchase Orders" which are stated to be "complementary" of each other and to be an integral part in all effects and results with the other.

Having noted this aspect of the form and language of the so-called "purchase orders", the subsequent findings of the court note various matters of substance in the contract such as the right of YPF to designate the discharge port (Finding No. 9), the safe berth provisions (Finding No. 10), the lighterage provision (Finding No. 11) and the exemptions clause (Finding No. 56). Throughout the court continues to characterize the contract between YPF and Republic as an Affreightment Contract.

Similarly, in its discussion on the law and its conclusions of law, the contract is referred to as an Affreightment Contract.

The trial court's conclusions of law and, in particular, its conclusion No. 1, are tantamount to a holding that admiralty jurisdiction is present.

The opinion of the Court of Appeals took explicit note of the form of the contract and of its appendages, as well as the statement that the two purchase orders "are only one order with Condition C. & F." (pp. 3a and 4a of the appendix to petitioner's brief). The Court of Appeals likewise construed the agreement between YPF and Republic as an Affreightment Contract.

In characterizing the contract in this fashion and in construing the contract according to the well settled law governing safe berth provisions both courts were entirely justified. Bouvier's Unabridged Law Dictionary (3rd ed., 1914) defines affreightment as follows:

> "The contract by which a vessel, or the use of it, is let out to hire".

De Kerchove's International Maritime Dictionary (2nd ed., 1961) has the following entry opposite "Affreightment":

> "A contract of affreightment is one with a shipowner to hire his ship or part of it for the carriage of goods. Such a contract generally takes the form of a charter party or a bill of lading. In French law, the terms freighting and affreighting have differing usages. The owner of a ship is called the freighter (*fréteur*); he is the lessor. The merchant is called the affreighter (*affréteur*); he is the hirer."

The leading English textual authority in the field, Scrutton, "Charterparties and Bills of Lading" (16th ed.,

1955), commences his work with a chapter entitled "The Contract of Affreightment". The opening paragraph of that work will stand as a definition of the term:

> "Article 1.—Nature of the Contract
>
> When a shipowner, or person having for the time being as against the shipowner the right to make such an agreement, agrees to carry goods by water, or to furnish a ship for the purpose of so carrying goods, in return for a sum of money to be paid to him, such a contract is called *a contract of affreightment* and the sum to be paid is called *freight*."

The petitioner does not dispute that a charter party is a contract wholly maritime and within the admiralty jurisdiction of the federal courts. Indeed, it could not well do so. 1 Benedict on Admiralty (6th ed., 1940) § 63. A contract of affreightment is no less a maritime contract and within the admiralty jurisdiction of the federal courts. Benedict, supra, § 66, where a contract "by one to furnish vessels and by another to furnish cargo for such vessels" is cited as an instance of a maritime contract.

In the case cited for this proposition by the author, *Graham* v. *Oregon R. & Nav. Co.*, 134 Fed. 454, 135 Fed. 608, the Court first rejected a libel as without the admiralty jurisdiction where it pleaded an agreement between a railroad company and the owner of certain steamships for arrangements for a through line of transportation. Upon leave to amend, the libellant recast the libel to plead an agreement for the furnishing of cargoes on the respondent's part and of steamships on the libellant's part to carry the cargoes. The amended libel, as was the case with the original libel, incorporated the entire terms

of the agreement. It was held, 135 Fed. 608, 611, that the amended libel was within the admiralty jurisdiction:

> "The allegations of the amended, libel, however, are quite different from those of the original. The agreement contained in Appendix "A", instead of being a statement of the terms of the agreement as formerly alleged, is now described as merely incidental to the main contract, which is set forth in the paragraphs quoted above. The allegations of the new libel set forth a contract for the furnishing of cargoes on the respondent's part and of steamships on the libellant's part to carry the cargoes. Such a contract is essentially maritime within the authorities. Quirk *v.* Clinton, 20 Fed. Cas. 146; Patterson *v.* Baltimore Steam Packet Co. (D.C.) 101 Fed. 296; Id., 106 Fed. 736, 45 C.C.A. 575, 66 L.R.A. 193; Id. (D.C.) 106 Fed. 957.

The hornbook authority on the admiralty law of this country is Robinson on Admiralty (1939). Under the subheading "Contracts for carriage by a vessel are maritime whether the ship is a common carrier or a chartered vessel", at page 185, the following appears:

> "Whether the shipowners' contracts for affreightment of cargo are maritime engaged the attention of the Supreme Court in New Jersey Steam Nav. Co. *v.* Merchants' Bank. In an opinion of historical value to the whole topic of admiralty contract, the court decided that the shipper who sent goods under a contract of carriage could sue in admiralty for the loss by fire of the goods. Of this case the Supreme Court in Morewood *v.* Enequist said: 'The whole subject was most thoroughly investigated. * * * Everything connected with the history of courts of admiralty from the reign of Richard the Second * * * was brought to our notice. We then decided that charter parties and contracts of

affreightment are "maritime contracts" within the true meaning and construction of the constitution * * * and recognized in courts of admiralty.' The subsequent judicial history of the topic is in accord with this view.

"The term 'charter party' may however be here given an explanation. In the Lexington and Morewood cases the ship was simply carrying package freight for which separate arrangements were made for each package or group of packages. As a 'general ship', the owner loads her by gathering cargo from many. In such a case his contract with each shipper is one of affreightment. It is likewise called 'affreightment' if he operates his own ship but carries in her the cargo of a single person. Yet in that case the arrangement is also called a 'charter' and is again distinguished from a 'demise' of the ship. The last mentioned is also a charter but in such form that the charterer himself operates the vessel. The distinction between the forms of the charter is important in determining the liabilities of the ship owner and the cargo owner, both to each other and to third parties. At the present time it is only necessary to say that all these contracts are so far maritime as to fall within the admiralty jurisdiction, as do passenger contracts" (Footnotes omitted).

See, also, Gilmore & Black "The Law of Admiralty" (1957) § 1-10, pp. 20-21.

Petitioner's contentions with respect to the jeopardy said to be involved for the Revised American Foreign Trade Definitions adds nothing to its argument, since two "complementary" contracts under which the purchaser buys goods on the one hand and on the other hand buys transportation for such goods is in no sense a C. & F. contract under the American Foreign Trade Definitions

or any other definitions. The fact that YPF saw fit to insert the language it now relies upon can in no way alter this reality. Calling a contract, or a set of contracts, "C. & F." will not make them so if they are not such in fact. It requires no citation of authority to sustain the proposition that the courts will look to substance rather than form when it is necessary to determine the actual nature of an agreement.

It is also perhaps too obvious to require saying that any contract for the carriage of goods, or hire of a vessel, or for maritime transportation is the purchase by one party and the sale by another of carriage or the means for such carriage.

It should be noted here that the thrust of the petitioner's assertions on this point are not directed to the merits of the suit below but to the proposition that it was entitled to a trial of the merits on the civil side of the court and with the right to a jury. In this connection it should be pointed out that the time honored mode for challenging the admiralty jurisdiction of the federal courts is by exceptions duly and timely taken. As Benedict, *supra*, Volume 2, § 333, observes:

> "* * * in the absence of exceptions filed the court will be slow to listen to any objections whether to form or substance"

and elsewhere, in the same section, the author states:

> "Exceptions must be taken promptly within the time limited by the district court rules and a failure to file exceptions is a waiver of the right to except."

It is not necessary to challenge the undoubted right of any court to take under advisement the question whether jurisdiction over the subject matter is present to make the

point that petitioner's contentions in this regard come as an eleventh-hour afterthought and are inferentially suspect on their merits. The first active assertion by the petitioner that there was any defect in the admiralty jurisdiction of the court came in the brief filed by it upon its second petition for a rehearing by the Court of Appeals.

It should also be noted that the Court of Appeals for the Second Circuit, in *James Richardson & Co.* v. *Connors Marine Co.*, 141 F. 2d 226, sanctions the retention of a case originally brought in admiralty on the civil side of the court where admiralty jurisdiction is negatived if it is shown that diversity jurisdiction exists.[1] The Court there stated at p. 229:

> "* * * Moreover, acceptance of respondent's contention would not lead to reversal and dismissal of the action, as it claims, but merely dismissal of the appeal (as allowable only from an *interlocutory* decree in admiralty, 28 U.S.C.A. §227, Jud. Code §129, as amended) and continuance of the action at law with the commissioner treated as a master under F.R.C.P. 53(a). For here all the facts showing diversity jurisdiction are presented, and it is well settled that under such circumstances an action shall be treated as within that jurisdiction where appropriate, even though it may have been commenced in admiralty. Moran Towing & Transportation Co. v. Navigazione Libera Triestina, S.A., 2 Cir., 92 F. 2d 37, 39, certiorari denied 302 U. S. 744, 58 S. Ct. 145, 82 L. Ed. 575; Admiral Oriental Line v. United States, 2 Cir., 86 F. 2d 201, 203; Prince Line v. American Paper Exports, Inc., 2 Cir., 55 F. 2d 1053; Cory Bros. & Co. v. United States, 2 Cir., 51 F. 2d 1010; Louis Dreyfus

1. Diversity jurisdiction is also present in this case since the libellant is a New York corporation, Republic a Panamanian corporation and YPF a corporate agency of the Republic of Argentina.

> v. Paterson Steamships, 2 Cir., 43 F. 2d 824, 72 A.L.R. 242; Owens v. Breitung, 2 Cir., 270 F. 190; United States ex rel. Pressprich & Son Co. v. James W. Elwell & Co., 2 Cir., 250 F. 939, certiorari denied 248 U. S. 564, 39 S. Ct. 8, 63 L. Ed. 423."

With respect to petitioner's belated invocation of the Seventh Amendment, a sufficient answer is found in Rule 38 of the Federal Rules of Civil Procedure, under which the failure of a party to serve a demand for a jury as required by Rule 38(b), namely no later than ten days after the service of the last pleading directed to any issue triable of right by a jury, and to file such demand as required by Rule 5(d) of the same Rules, constitutes a waiver of the right to trial by a jury.

Petitioner's Charges of Collusion Have Been Found and Held Without Merit

On this score petitioner is belaboring a much flogged mule. Petitioner's exposition on this point, at page 28 of its brief, contains a flagrant misstatement of fact. It is there stated that "it was not until after the conclusion of the trial and while the appeal was pending in the Court of Appeals that petitioner's counsel learned that libellant and Republic were of common ownership". This statement is wholly untrue. Both counsel for petitioner and the trial judge were informed prior to the trial that the libellant and Republic were affiliated companies.

The Court of Appeals' opinion reveals a thorough-going scrutiny of these charges. The Court of Appeals held:

> " * * * The Court was not deceived as to the course Republic was taking, Republic's abstentionist position having been plain from the beginning, and it is

hard to see that YPF suffered any prejudice thereby. YPF knew about the nature of the representation of Republic from the outset of the litigation * * * Even if YPF is entitled to have the separate entities of the congeries of Schwartz-owned corporations disregarded, it would be liable none the less, since the ultimate responsibility to provide a safe berth rested on it; and the true party in interest would still be American. Indeed, we see no reason why libellant's direct claim against YPF should not have been sustained, on a theory akin to the liability to the shipowner of a stevedoring company that contracts with a charterer, Crumady v. The J. H. Fisser, 358 U. S. 423, 428 (1950), or even with a consignee, Waterman S. S. Corp. *v.* Dugan & McNamara, Inc., 364 U. S. 421, 423-425 (1960). *Neither are we told of any substantial defenses that an independent proctor could have interposed for Republic with any hope of success.* The main suggestion is that something could have been made of the fact that Milanowski worked also for Circle Shipping, another Schwartz-owned corporation which was agent for libellant as well as for Republic, so that any fault on his part would defeat the recovery by the former against the latter. A sufficient answer is that we discern no fault to impute. (Emphasis supplied)" (pp. 10a and 11a of appendix to petitioner's brief)

The authorities relied upon by petitioner under this heading are substantially the same as those urged upon the Court of Appeals. These cases may be summarized as involving situations in which an unrepresented third party or parties were placed in jeopardy by a contrived suit in which the real issue, if any, had no adversary representation. Moreover, none of these authorities deal with instances of impleader, a practice which has been a

commonplace in maritime litigation since the predecessor of the present Rule 56 of the Supreme Court Admiralty Rules was adopted by this Court.

If the fact was that the damages and expenses complained of in this libel had been incurred by the respondent Republic, a direct action in admiralty against YPF would have been available to Republic. The fact that the recovery adjudged against YPF here has arisen by way of impleader has altered YPF's rights not one whit.

The Petition for a Writ of Certiorari Should Be Denied.

Respectfully submitted,

David I. Gilchrist,
Proctor for Respondent
Republic Tankers, S.A.
Office & P. O. Address
26 Broadway,
New York 4, New York